

Jagdis Singh a/l Banta Singh v Zakaria bin Yahaya & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO A-02(NCVC)(W)-721-04 OF 2017TENGKU MAIMUN, NALLINI PATHMANATHAN AND ZABARIAH
YUSOF JJCA

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25 JULY 2018

Trusts and Trustees — Trust — Existence of — Whether evidence did not show legal firm was to hold lender's loan monies to borrower as stakeholder or trustee — Whether contemporaneous documents did not establish a trustee/fiduciary relationship — Whether legal firm appointed solely by borrower to receive loan monies and disburse it as instructed — Whether lender's failure to plead issue of conspiracy to defraud precluded him from raising that allegation against defendants

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The appellant, a practising lawyer and businessman, agreed to give an interest-free loan of RM550,000, repayable on demand, to the first respondent ('Zakaria') to carry out a commercial venture. After giving Zakaria an initial payment of RM50,000 in cash, the appellant deposited the rest of the loan sum with the second respondent ('R2') legal firm which was appointed by Zakaria to receive the monies on his behalf and then to disburse it to certain parties as instructed by him. In consideration for the loan, charges over two pieces of land in the appellant's favour were to be executed and Zakaria was to make it possible for the appellant's company to obtain certain oil palm harvesting rights ('the JVA'). The JVA failed to materialise and the appellant found he was unable to contact Zakaria. He also found that R2 had released the entire balance loan sum of RM500,000 to Zakaria. The appellant sued Zakaria and R2 for return of the loan monies. The High Court allowed the claim against Zakaria but dismissed the claim against R2. The appellant had premised his claim against R2 on breach of trust contending that R2 was jointly appointed by himself and Zakaria to hold the RM500,000 on trust pending the coming into effect of the JVA and that by releasing the entire sum to Zakaria without giving him notice, R2 had committed breach of trust, acted in bad faith and breached its fiduciary duties to the appellant. Alternatively, the appellant premised his claim against R2 on breach of the terms of its retainer and for negligence. In its defence, R2 said it was not appointed by the appellant but only by Zakaria to receive the loan and disburse it in accordance with Zakaria's instructions. R2 denied the existence of any trust or fiduciary relationship with the appellant. R2's contentions found favour with the trial judge. Zakaria was, however, ordered to return the RM550,000 to the appellant as the trial judge found that the parties had labored under a fundamental mistake of fact essential to their loan agreement which rendered the agreement void under s 21 of the Contracts Act 1950. In the instant appeal against the High Court's decision, the appellant

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A abandoned his appeal as against Zakaria and only proceeded with the appeal as against R2.

Held, dismissing the appeal as against R2 and striking out the appeal as against Zakaria:

- B (1) There was no evidence of any contractual relationship between the appellant and R2. The trial judge did not err when he found that R2 did not hold the loan monies upon trust for the appellant. Hence, there was no question of breach of trust (see para 59).
- C (2) The contemporaneous documents adduced did not support the appellant's contention that a trust had been created. Nothing in the loan agreement expressly mentioned any trust or was even suggestive of one. The loan agreement did not mention the purpose of the loan and there was no restriction as to how the loan monies were to be applied by Zakaria thus giving him the liberty to deal with the monies as he deemed fit. There was no mention in the loan agreement about R2 or that R2 held the monies on trust or as a stakeholder. There was no evidence that R2 was appointed by the appellant. Rather, it was Zakaria who had appointed R2 to receive the loan sum from the appellant and to then disburse it as instructed by Zakaria. There was also no evidence to show that R2 was instructed to prepare the JVA between the appellant's company and Zakaria (see paras 27–30, 33 & 45–46).
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- F (3) There was no basis for the appellant to allege conspiracy to defraud against R2. The appellant's pleadings did not contain any averment of conspiracy/conspiracy to defraud against the respondents. The failure to plead the issue precluded the appellant from raising it. In any event, the evidence did not support any form of conspiracy to defraud against R2 (see paras 54 & 56–57).

G **[Bahasa Malaysia summary]**

H Perayu, peguam dan ahli perniagaan, bersetuju untuk memberikan pinjaman bebas faedah sebanyak RM550,000, boleh dibayar semula atas tuntutan, kepada responden pertama ('Zakaria') untuk menjalankan perniagaan komersial. Selepas memberikan Zakaria bayaran permulaan sebanyak RM50,000 dalam tunai, perayu menandatangani baki jumlah pinjaman dengan responden kedua ('R2') firma undang-undang yang mana dilantik oleh Zakaria untuk menerima wang bagi pihaknya dan kemudiannya untuk membayarnya kepada pihak-pihak tertentu seperti yang diarahkan olehnya.

I Dalam balasan untuk pinjaman tersebut, caj-caj ke atas dua keping tanah memihak perayu disempurnakan dan Zakaria adalah untuk membuatkan syarikat perayu berkemungkinan mendapatkan hak memetik kelapa sawit tertentu ('PUS'). PUS gagal untuk dilaksanakan dan perayu mendapati yang dia tidak dapat menghubungi Zakaria. Dia juga mendapati bahawa R2 telah

melepaskan keseluruhan baki jumlah pinjaman sebanyak RM500,000 kepada Zakaria. Perayu menyaman Zakaria dan R2 untuk memulangkan wang pinjaman. Mahkamah Tinggi membenarkan tuntutan terhadap Zakaria tetapi menolak tuntutan terhadap R2. Perayu telah mendasarkan tuntutannya terhadap R2 atas pecah amanah dengan berhujah bahawa R2 dilantik secara bersama oleh dirinya dan Zakaria untuk memegang wang sejumlah RM500,000 atas amanah sementara menunggu penguatkuasaan PUS tersebut dan bahawa dengan melepaskan keseluruhan wang kepada Zakaria tanpa memberinya notis, R2 telah melakukan pecah amanah, bertindak dengan niat jahat dan melanggar tugas-tugas fidusiarinya kepada perayu. Secara alternatif, perayu berdasarkan tuntutannya terhadap R2 atas pelanggaran terma-terma terhadap retainernya dan untuk kecuaiannya. Dalam pembelaannya, R2 menyatakan ia tidak dilantik oleh perayu tetapi hanya oleh Zakaria untuk menerima pinjaman dan membayarkannya mengikut arahan-arahan Zakaria. R2 menafikan kewujudan apa-apa amanah atau hubungan fidusiarinya dengan perayu. Hujahan R2 mendapat sokongan hakim perbicaraan. Zakaria walau bagaimanapun diperintahkan untuk memulang wang sebanyak RM550,000 kepada perayu memandangkan hakim perbicaraan mendapati bahawa pihak-pihak telah bekerja keras di bawah kesilapan asas fakta yang penting kepada perjanjian pinjaman mereka yang menyebabkan perjanjian tersebut batal di bawah s 21 Akta Kontrak 1950. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, perayu meninggalkan rayuannya terhadap Zakaria dan hanya meneruskan dengan rayuan terhadap R2.

Diputuskan, menolak rayuan terhadap R2 dan membatalkan rayuan terhadap Zakaria:

- (1) Tidak terdapat keterangan mengenai apa-apa hubungan kontraktual di antara perayu dan R2. Hakim perbicaraan tidak tersilap apabila dia mendapati bahawa R2 tidak memegang wang pinjaman atas amanah untuk perayu. Maka, tidak terdapat soalan pecah amanah (lihat perenggan 59).
- (2) Dokumen-dokumen semasa yang dikemukakan tidak menyokong hujahan perayu bahawa amanah telah dibentuk. Tiada apa-apa dalam perjanjian pinjaman secara nyata menyebut apa-apa amanah atau satu yang mencadangkan. Perjanjian pinjaman tidak menyebut tujuan pinjaman tersebut dan tidak terdapat halangan terhadap bagaimana wang pinjaman sepatutnya dipohon oleh Zakaria dengan itu memberikannya kebebasan untuk berurusan dengan wang sebagaimana yang dia fikirkan patut. Tidak terdapat sebutan dalam perjanjian pinjaman mengenai R2 atau bahawa R2 memegang wang atas amanah atau sebagai pemegang amanah. Tidak terdapat keterangan bahawa R2 dilantik oleh perayu. Sebenarnya, ia adalah Zakaria yang melantik R2 untuk menerima jumlah pinjaman daripada perayu dan untuk kemudian membayarnya seperti yang diarahkan oleh Zakaria. Juga tidak terdapat

- A keterangan untuk menunjukkan bahawa R2 diarah untuk menyediakan PUS tersebut di antara syarikat perayu dan Zakaria (lihat perenggan 27–30, 33 & 45–46).
- B (3) Tidak terdapat asas untuk perayu mendakwa konspirasi untuk menipu terhadap R2. Pliding perayu tidak mengandungi apa-apa hujahan konspirasi/konspirasi untuk menipu terhadap responden-responden. Kegagalan untuk memplid isu menghalang perayu daripada membangkitkannya. Walau bagaimanapun, keterangan tidak menyokong apa-apa bentuk konspirasi untuk menipu terhadap R2 (lihat perenggan 54 & 56–57).]
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Notes

For cases on existence of trust, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3583–3598.

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Cases referred to

- Barclays Bank v Quistclose Investments, Ltd* [1968] 3 All ER 651; [1968] UKHL 4, HL (distd)
- E *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, FC (refd)
- Bristol and West Building Society v Mothew; (t/a Stapley & Co)* [1996] 4 All ER 698, CA (refd)
- F *Gurbachan Singh s/o Bagawan Singh & Ors v Vellamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719, FC (refd)

Legislation referred to

- G Contracts Act 1950 ss 21, 24

Appeal from: Suit No 22NCVC-107 of 2015 (High Court, Ipoh)

- Mohd Haziq Pillai (Sangeet Deo and Imerdeep Singh with him) (Sandhu & Assoc) for the appellant.*
- H *Jason Singh (Jason Singh & Rakan-Rakan) for the first respondent.*
Iruthuya Raj (Raj Selva & Co) for the second respondent.

Zabariah Yusof JCA:

- I [1] This appeal by the appellant (the plaintiff in the High Court) is against the decision of the learned High Court judge in respect of the first and second respondents (the first and second defendants in the High Court), in:

- (a) allowing the claim against the first respondent wherein the first respondent is to pay to the appellant the sum of RM550,000 with interest; A
- (b) the first respondent is to pay costs of RM20,000 to the appellant; and
- (c) dismissing the claim by the appellant against the second respondent with costs of RM10,000. B

[2] At the commencement of the hearing of the appeal, counsel for the appellant intimated to us that he is only proceeding with the appeal against the second respondent only. Hence this judgment is only pertaining to the issues raised against the second respondent. C

[3] After hearing submissions from counsel and after evaluation of the grounds of the learned trial judge, we dismissed the appeal against the second respondent with costs. The appeal against the first respondent was struck off accordingly. D

[4] We now state our reasons. In this judgment, parties will be referred to, as they were, in the High Court. E

BACKGROUND

[5] The claim by the plaintiff arose from an application for TOL (harvesting rights) by DYMM Sultan Pahang ('Tuanku') over 850 acres of oil palm plantation in the state land in the district of Maran, Pahang (pp 99–100 of the CB). The application is dated 7 December 2011. F

[6] To facilitate the application, Tuanku appointed his adviser, Setia Wangsa Pahang Dato' Mustafa ('DSW'), to act as his agent. DSW subsequently appointed the first defendant to handle the day to day matters relating to the application. An undated memorandum of understanding ('MOU') was signed between Tuanku and the first defendant's company, Alefra Corp Sdn Bhd ('first MOU') (the MOU can be found at pp 11–17 of the CB of the second defendant). G
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[7] The plaintiff, a practicing lawyer and businessman from Ipoh heard of the application, decided to meet up with the first defendant at his house. The first defendant informed the plaintiff that Tuanku had applied for the harvesting rights to the said land and the first defendant had those rights but he lacked the financial means to perform his contractual obligations with Tuanku. The plaintiff agreed to advance RM450,000 to the first defendant. As a result both parties entered into a loan agreement vide 'memorandum' dated 10 I

A January 2012 and made the first payment of RM50,000 in cash to the first defendant (p 102 of the CB).

B [8] The plaintiff was aware that when the loan agreement was signed, the first defendant's company, Alefra Corp Sdn Bhd had entered into the first MOU with Tuanku.

C [9] On 13 January 2012, the first defendant appointed the second defendant as his solicitors to receive the loan of RM400,000 (which the plaintiff had agreed to advance to the first defendant under the loan agreement) and also to receive a further sum of RM100,000 allegedly being payment to be made to Tuanku, from the plaintiff (p 36 of the CB of the second defendant).

D [10] On 17 January 2012, the plaintiff and the first defendant appeared in the second defendant's office and signed a confirmation and payment acceptance of RM400,000 (p 37 of the CB of the second defendant). Pursuant to this document the plaintiff deposited the balance of the loan with the second defendant. It was expressly understood by all parties at the meeting on 17 January 2012 that the plaintiff's company, Ebony Ace Development Sdn Bhd is to enter into a MOU ('second MOU') with Tuanku to handle the harvesting rights. The plaintiff also later made payment of RM100,000 on 31 January 2012 to the second defendant.

F [11] Upon receipt of the money, the second defendant disbursed the money which the second defendant claimed to be in accordance with the instructions of the first defendant (p 38 of the CB of the second defendant). There is no dispute that the second defendant made payments to those persons named in the payment instructions.

G [12] The plaintiff alleged that, as the second MOU between the plaintiff's company and Tuanku was not prepared, the plaintiff refused to make further payment. The plaintiff called the first defendant to which he only responded once and remained uncontactable thereafter. The plaintiff then called the second defendant and asked what happened to the RM500,000 which the plaintiff had deposited with his firm. The second defendant informed the plaintiff that he had released all the RM500,000 to the first defendant personally. The plaintiff filed the writ of summons and statement of claim.

I *The plaintiff's case*

[13] The plaintiff claims that the second defendant had committed breach of trust which resulted in the plaintiff's loss and damage. The particulars of the breach of trust is as pleaded in para 21 of the statement of claim, ie:

- (a) the second defendant was appointed by the plaintiff and the first defendant to receive the balance loan payment on trust and second defendant duly acknowledged receipt of the said RM500,000; A
 - (b) at all material times and specifically at the meeting of 17 January 2012, it was expressly understood by all parties ie the plaintiff, the first defendant and the second defendant that the second defendant was appointed for three reasons namely: B
 - (i) to prepare the agreement between the plaintiff and the first defendant; C
 - (ii) to hold the monies paid by the plaintiff to the first defendant on trust until the said agreement between the plaintiff and the first defendant is executed; and
 - (iii) to prepare the second MOU between the plaintiff's company, Ebony Ace Development Sdn Bhd and Tuanku; D
 - (c) by the second defendant holding the monies on trust for the plaintiff and as trustee, the second defendant is in a fiduciary position to act reasonably, honestly and in good faith; and E
 - (d) the second defendant committed a breach of trust and/or breached his fiduciary duty and acted in bad faith by releasing monies held on trust and failing to notify and/or obtain permission from the plaintiff. F
- As a result of the second defendant's breach of trust towards the plaintiff, the plaintiff suffered losses of RM550,000 and loss of profits of RM3.6m. G
- [14] It was also pleaded as an alternative claim by the plaintiff that the second defendant was in breach of the said term of retainer and/or negligent, particulars of which are as follows: H
- (a) failure of the second defendant to take adequate steps to confirm that the intended contract was duly executed before releasing the said trust monies to the first defendant; I
 - (b) paying the sum deposited in trust to the first defendant without the express authority of the plaintiff when the contract remained unexecuted; and
 - (c) not informing the plaintiff what transpired over his undertaking to get the first defendant to execute the contract. I

[15] By reason of the second defendant's breach of warranty of authority and/or breach of retainer and/or negligence the plaintiff suffered loss and damage.

- A** [16] The plaintiff claims for the following reliefs against the second defendant:
- (a) a declaration that the monies ie RM500,000 is held by the second defendant upon trust for the plaintiff;
 - B** (b) judgment against the second defendant for RM500,000;
 - (c) further or in the alternative, loss of profits at RM30,000 per month for ten years;
 - C** (d) general damages;
 - (e) special damages;
 - (f) aggravated damage;
 - (g) punitive damages; and
 - D** (h) interest.

The second defendant's case

- E** [17] The second defendant was appointed in writing by the first defendant on 13 January 2012. Never at any point in time that the second defendant was acting for or on behalf of the plaintiff. The instructions received were from the first defendant only.
- F** [18] Premised on the instructions in writing by the first defendant, the second defendant had made payments of the whole amount RM500,000 which was deposited with the second defendant, to persons named by the first defendant. Further the first defendant had provided a letter of indemnity to indemnify the second defendant against any claim relating to the said payments (p 39 of the CB of the second defendant).
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- [19] The second defendant denies any fiduciary relationship with the plaintiff. There was no evidence of any trust, express or implied as alleged by the plaintiff. Therefore, the issue of breach of trust or breach of fiduciary duty
- H** by the second defendant does not arise.
- [20] Alternatively, the second defendant states that the loan agreement between the plaintiff and the first defendant is for the purposes of lobbying to facilitate the approval for the application for TOL. Hence this is against public policy and tainted with illegality wherein s 24 of the Contracts Act 1950 applies.
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[21] In addition, the transaction was carried out under the mistaken belief that there was an application for TOL by Tuanku which was still pending, at

the material time. Later it was found out that there was already a withdrawal of the application by Tuanku. Hence the subject matter of the agreement no longer subsisted. Parties entered into the agreement under the mistaken belief on the availability of the subject matter of the same. The agreement by the parties is therefore void under s 21 of the Contracts Act 1950.

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The findings of the High Court judge

[22] In the course of the trial of the case, after the plaintiff had closed his case and the defence started to give evidence, the court granted leave to the plaintiff to call an additional witness, ie assistant land administrator Ghazali bin Abu Bakar ('SP3') from Maran Land Office who confirmed that Tuanku had withdrawn the application for TOL as early as 6 January 2012. This alters the plaintiff's case drastically as the subject matter of the dispute no longer exist. A letter written by the private secretary to Tuanku dated 6 January 2012 (p 103 of the CB) explained this point. Hence, the learned trial judge found that the parties labored under a fundamental mistake of fact essential to the transaction. The judge, therefore, found that the agreement between the plaintiff and the first defendant is void pursuant to s 21 of the Contracts Act 1950. As a result, the learned trial judge ordered the first defendant to pay back the loan of RM550,000 to the plaintiff.

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[23] With regards to the claim of the plaintiff against the second defendant, the learned trial judge found that there is no undertaking or stakeholding arrangement with the second defendant. Neither was the second defendant appointed as trustee, expressly or constructively.

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[24] The letter of appointment points to the fact that the second defendant was appointed by the first defendant to receive the money from the plaintiff pursuant to the confirmation of payment acceptance and that the letter of appointment instructed the second defendant to distribute the RM500,000 to various named individuals which was supplied by the first defendant. Hence the claim by the plaintiff against the second defendant was dismissed with costs of RM10,000.

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Issues

[25] The issues for consideration in relation to the second defendant are as follows:

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- (a) whether the second defendant holds the monies in trust for the plaintiff;
- (b) if so, whether the second defendant had committed a breach of trust/breach of fiduciary duty;

- A (c) whether the second defendant owes a duty of care to the appellant when the appellant deposited monies into his clients account; and
(d) whether there is conspiracy between the defendants.

B OUR FINDINGS

Whether the second defendant holds the monies in trust for the appellant

- C [26] The plaintiff alleged that the loan to the first defendant was for a specific purpose ie to pay to Tuanku and that the second defendant holds the money in trust for the plaintiff.

- D [27] From the contemporaneous documents adduced, they do not support the contention of the plaintiffs as to the creation of any form of trust. The loan agreement between the plaintiff and the first defendant as found in the 'Memorandum' dated 10 January 2012 between the plaintiff and the first defendant (p 102 of the CB), states as follows:

MEMORANDUM

- E I, Zakaria Bin Yahaya ... , the undersigned acknowledge receiving a first payment of RM50,000.00 towards a total loan of RM450,000.00 free of interest from Jagdis Singh a/l Banta Singh ...

The full loan or any part thereof is repayable on demand.

It is to be secured by a charge over land described below together with the deposit of title deeds as follows:

- F (1) Lot No 3017 held under HS (M) 1565 in the Mukim of Luit, Daerah Maran, Negeri Pahang.
(2) Lot No 3016 held under GM 3561 in the Mukim of Luit, Daerah Maran, Negeri Pahang.

- G The registered owner is the registered owner of 81/88 shares of both lots and trustee of 7/88 of both lots on record but has now become beneficial owner of the same and will be registered in due course as beneficial owner of what now appears as a trust.

- H Mr Zakaria Bin Yahaya will in due course enter into a Joint venture contract with Ebony Ace Development Sdn Bhd, to harvest oil palm fruit from a land in Daerah Maran, Mukim Luit adjoining Timor Oil Palm Plantation Limited, 850 acres in area belonging to the state of Pahang as appears in the area shaded yellow in the plan attached herewith of which KDYMM Sultan Ahmad Shah ibni Al Marhum Sultan Abu Bakar of Istana Abu Bakar Pekan Pahang Darul Makmur has made an application for tapping rights as per reference LPS 42/2011 which application is expected to be granted. A copy of the application is attached herewith ...

- I Signed by Zakaria Bin Yahaya
Date 10.1.2012
Jagdis Singh a/l Banta Singh

Witnesses by	Date 10.1.2012 Mohanjeet Singh a/l Ranjit Singh Date 10.1.2012	A
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[28] The above document ('loan agreement') is an acknowledgement by the first defendant that he had received a loan from the plaintiff free of interest, in consideration of the first defendant promising to pay back upon demand. There is nothing in the loan agreement which states expressly of any trust or even suggestive of the same. The loan agreement does not mention the purpose of the loan and neither is there any restriction on how the loan should be applied by the first defendant, thus giving the first defendant the liberty to utilise the loan as he deems fit.

[29] What is pertinent is that, there is nothing in the loan agreement that makes reference to the second defendant, least of all that the loan sum is to held by the second defendant on trust.

[30] Neither is there any manifestation of the role as stakeholder on the part of the second defendant from the loan agreement. In cross examination, the plaintiff ('SP1') and his son in law ('SP2') admitted that there was no written term that the money was paid to the second defendant as stakeholder. However SP2 said that it was agreed verbally that the second defendant is to hold the money as stakeholder. This, at best, is a bare assertion. The confirmation of payment acceptance document dated 17 January 2012 (p 37 of the CB of the second defendant), confirms that payment of RM400,000 from the plaintiff to the second defendant, as being payment for the balance of friendly loan sum pursuant to the loan agreement dated 10 January 2012. The confirmation of payment acceptance document was signed by the first defendant and the plaintiff at the office of the second defendant. The only term and condition stated therein is that:

Both parties agreed that the legal jurisdiction of this matter shall be in the High Court of Ipoh and the Subordinate Court in Ipoh, Perak, Darul Ridzuan.

[31] Save for the above, there is no stipulation that payment was to the second defendant's firm as stakeholders.

[32] There was also no term or condition imposed that the release of the balance of the loan was subject to any restrictions or trust. If the intention was to create a trust, parties could have inserted it as a condition in the document. It was in evidence by the second defendant that the only condition the plaintiff wanted was that the High Court Ipoh must have the jurisdiction because the plaintiff said it was too troublesome for him to come from Ipoh to Kuantan in

A case there is a dispute between the parties. Save for the terms and conditions as stated in the confirmation and payment acceptance which talks about jurisdiction of the Ipoh court in the event of a dispute, there is no term that payment was to be held on trust or as stakeholder.

B [33] The balance sum of the loan was paid to the first defendant by the plaintiff on 17 January 2012. The second defendant received the loan on behalf of the first defendant and subsequently disbursed it in accordance with the instructions of the first defendant. This is in accordance with the appointment of the second defendant by the first defendant which can be found in the letter from the first defendant to the second defendant (p 36 of the CB) which states:

Nama: ZAKARIA BIN YAHAYA

.....

D Tarikh: 13 Jan 2012

Kepada: TETUAN ZUFAIDI & ASSOCIATES

.....

E Bahawasanya saya dengan ini bersetuju melantik Tetuan Zufaidi & Associates sebagai Peguambela dan Peguamcara untuk mengendalikan kes kami mengikut mandate seperti berikut:

F 1. menerima kesemua bayaran pinjaman persahabatan saya daripada Mr. Jagdis Singh berjumlah RM500,000.00. Pinjaman tersebut adalah untuk saya gunakan membayar wang lobi dan upah saya mengusahakan sehingga termeterainya satu perjanjian usahasama syarikat saya dengan KDYMM Sultan Pahang.

2. *Saya mengarahkan tuan membahagikan wang RM500,000.00 tersebut kepada penama-penama yang akan diberikan kelak.*

G Bahawa perlantikan ini adalah berkuatkuasa dari tarikh di atas sehingga penyelesaian kes.

Yang benar,

.....

ZAKARIA BIN YAHAYA

H (Emphasis added.)

I [34] Subsequently, the first defendant issued ‘Client Instruction’ whereby the monies received by the second defendant was to be disbursed to certain named persons and/or for certain purposes (p 38 of the CB of the second defendant).

[35] The learned trial judge dealt with this issue in paras 30–33 in his grounds and came to the conclusion at para 35 that the plaintiff failed to prove any form of relationship between the plaintiff and the second defendant. We do

not find that the learned trial judge was plainly wrong in his findings premised on the contemporaneous documents adduced. Apart from the bare assertion by the plaintiff that the second defendant was appointed as stakeholder, there is no documentary evidence of the plaintiff appointing the second defendant, which negative any form of trust being created.

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[36] Similarly, the argument of the plaintiff that the trust was in the nature of a 'Quistclose' trust is bereft of any basis. The judge addressed this at para 28 in his grounds.

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[37] A 'Quistclose' trust arises when assets were given to a person for a specific purpose. In the event such purpose fails, the asset reverts back to the transferor. If a loan was given to a debtor, who undertakes to use the loan for a specific purpose, and segregates the creditor's money from his general assets, and if the debtor becomes insolvent, the creditor's money is refundable, and would not be available to pay the debtor's other creditors. This creates a situation of a resulting trust, ie due to the failure of the trust (as the purpose is not, or cannot be fulfilled), the monies become subject to a resulting trust in favour of the person who originally advanced the credit, and the person to whom the sums were advanced holds them as trustee.

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[38] 'Quistclose' trust has its origin from the case of *Barclays Bank v Quistclose Investments, Ltd* [1968] 3 All ER 651; [1968] UKHL 4 (*Quistclose*). In *Quistclose*, Rolls Razor Ltd had declared dividends to its shareholders on 2 July 1964, however it had no money to pay. At the same time, Rolls Razor Ltd owed Barclays Bank Ltd some money and Barclays Bank refused to increase the overdraft facility. As a result, Rolls Razor Ltd applied for a loan from Quistclose Investments Ltd. Quistclose agreed to grant a loan on condition that the dividend would be paid with it, and that the money would be put into a separate account with Barclays Bank. Accordingly, the money was paid into this account. When Barclays Bank received the cheque, it also received a covering letter informing Barclays Bank that the monies had been provided on loan and was to be used only for the purpose of paying the dividend. However, before the dividend was distributed amongst its shareholders, Rolls Razor Ltd went into voluntary liquidation. Quistclose sought to recover the money, contending that its agreement meant that Rolls Razor Ltd held the money on trust. Whereas Barclays Bank contended that the account was part of the general assets of Rolls Razor Ltd and that they were entitled to exercise a set-off of the money in the account against the debt that Rolls Razor Ltd owed with Barclays Bank. Lord Wilberforce, delivering the unanimous judgment of the House of Lords held that, given that the purpose of the money held, failed, the money was held by Rolls Razor Ltd on trust for the payment of the dividend. It was further held that the fact that the transaction was a loan did not exclude the implication of a trust. Barclays Bank, which had notice of the trust could

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A not retain the money as the assets did not form part of the beneficial estate of Rolls Razor Ltd. Barclays Bank was aware that Rolls Razor Ltd could not provide the money for the dividend and that this would have to come from an outside source and that it was never within the contemplation that money so provided could be used to reduce the existing overdraft.

B [39] The facts in *Quistclose* are unlike the present case. There is no evidence of any undertaking nor stakeholding arrangement with the second defendant. The document ie confirmation of payment acceptance, confirms that the money was received by the second defendant on behalf of the first defendant.

C There were no terms nor restriction imposed on the second defendant as to the manner of disbursement of the money. Neither was there any evidence of any intention to create a trust at the time the confirmation of payment acceptance was signed by the plaintiff and the first defendant. The first defendant appointed the second defendant on 13 January 2012 to receive the balance of the loan from the plaintiff and subsequently issued out 'Client Instruction' (p 38 of the CB of the second defendant) which expressly sets out the purpose for which the second defendant was appointed. The 'Client Instruction' reads:

E 1. ... I ... do hereby voluntarily agreed and instruct Messrs Zufaidi & Associates to assign payment received from Mr Jagdis Singh A/L Banta Singh in the sum of RM 400 000.00 only from solicitor's Client Account to the following beneficiary/ies:

- F i. Dato' Setiawangsa Pahang, Dato' : RM233,500.00
Mustafar Bin Abu Bakar
- ii. Legal fee and costs : RM 13,000.00
- iii. Mr. Zakaria Bin yahaya : RM153 500.00

G 2. That I ... do hereby agreed to keep Messrs Zufaidi & Associates fully indemnified against any claims or loss whatsoever from Mr Jagdis Singh A/L Banta Singh or any persons whosoever arising out of this transaction.

DATED: 28 Jan 2012

G Signed and agreed by,

.....

NAME: ZAKARIA BIN YAHAYA

H [40] The rule of construction of a document or a contract is that where the words in a document or contract are clear, the literal and ordinary meaning prevails. It is not for the court to improve upon the instrument of the contract which it is called upon to interpret. Gopal Sri Ram FCJ in the Federal Court case of *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 in delivering the judgment of the Federal Court held that:

I The court has no power to improve upon the instrument which it is called upon to construct, whether it be a contract, a statute or article of association. It cannot introduce terms to make it fairer or more reasonable. However, that meaning is not

necessarily or always what the authors or parties to the documents would have intended. It is the meaning to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed; see *Investors Compensation Scheme Ltd v West Bromwich Building Society*. It is this objective meaning which is conventionally called the intention of the parties, or the intention of parliament or the intention of whatever person or body was or is deemed to have been the author of the instrument.

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The 'Client Instruction' could not have spelt it out any clearer than what it states. One cannot read of any element or a hint of stakeholding nor undertaking on the part of the second defendant in the said document. The second defendant had disbursed the monies according to the instruction of the first defendant who had appointed him, and he cannot be faulted for doing just that.

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[41] Apart from submitting that there is a relationship between the plaintiff and the second defendant as trustee and/or stakeholder for the monies received, the plaintiff submits that the second defendant was a retainer for the plaintiff as well as the first defendant. In support, the plaintiff referred to the two receipts issued by the second defendant (p 240 of the *RR Jld 1B*).

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[42] The first receipt is in relation to the receipt of RM500 by the second defendant from the plaintiff which states the purpose of the receipt, namely, 'Open file for Charge'. Counsel for the plaintiff submitted that the loan agreement between the plaintiff and the first defendant dated 10 January 2012 mentioned about securities that is to be charged. The plaintiff had paid the second defendant RM500 to prepare charges to be secured over the said two properties. However, the second defendant in his evidence explained that the payment of RM500 was for travelling expenses to Maran Land Office to present the charge which was supposed to be prepared by the plaintiff's legal firm. The second defendant explained in his evidence as follows:

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Q: The plaintiff alleges that he has paid you RM 500.00 to prepare charges to be secured over two properties mentioned in the Memorandum in pg 1 of Ikatan Dokumen B. Did you agree to prepare the legal documents?

A: I did not. It was supposed to have been prepared by the plaintiff's firm in Ipoh and sent to me for presentation in the land Office in Pahang. The RM500.00 was to cover part-payment of the registration fees and travelling expenses. Plaintiff volunteered to pay RM500.00 and asked me to tell him if the sum is not enough. I just agreed and was willing to assist him as plaintiff's solicitors are from Ipoh which is far from Pahang.

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[43] From the loan agreement, it was the plaintiff's duty to obtain the title deeds from the registered owners of the two pieces of land and protect his

A interest. RM500 was paid as travelling expenses for the second defendant in assisting the plaintiff and there was no duty on the part of the second defendant to do anything more.

B [44] The second receipt is in relation to the receipt of RM400,000 which states the purpose of payment was 'balance of friendly loan sum pursuant to Memorandum of Understanding dated 10.1.2012'. This refers to the loan agreement. From the evidence, it is not denied that RM400,000 was received by the second defendant on behalf of the first defendant as part of the loan for the first defendant and the second defendant had disbursed it according to the instructions of the first defendant.

D [45] The plaintiff alleged that the payment by the plaintiff to the second defendant (ie RM400,000 and RM100,000) was to be paid by the second defendant in the following manner:

- (a) RM400,000 to the first defendant upon the execution of a JVA between the plaintiff and Ebony Ace Development Sdn Bhd; and
- E (b) RM100,000 to be paid over under the terms of that memorandum. The second defendant was to have prepared the memorandum, the terms of which were set out in a sample precedent that the second defendant gave to the plaintiff to read and keep. However there has not been any progress and the plaintiff took it that there is frustration of the intended contract.

F There was no evidence adduced to show that the second defendant was instructed to prepare the JVA between the first defendant and Ebony Ace Development Sdn Bhd. The loan agreement dated 10 January 2012 was prepared by the plaintiff and there was no evidence to show that the second defendant had anything to do with it.

G When the plaintiff and the first defendant came to see the second defendant on 17 January 2012 they were concerned with the preparation of the second MOU with Tuanku. It has got nothing to do with the loan agreement between the plaintiff and the first defendant. In any event, the second MOU with Tuanku can only come into being after the issuance of TOL to Tuanku had been obtained. The question of frustration raised in the plaintiff's letter never arose because the application by Tuanku for TOL is still pending at the material time (p 25 of the CB of the second defendant). The second defendant came into the picture rather late.

I [46] Hence there is no evidence adduced by the plaintiff to prove that the monies given to the first defendant which was received by the second defendant was to be held by the second defendant on trust. There was no evidence of any appointment by the plaintiff of the second defendant. Therefore, the issue of

breach of trust does not arise and neither does the second defendant owes any duty of care to the plaintiff, in the absence of any contractual relationship.

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Breach of fiduciary duty

[47] A fiduciary relationship is a situation where one who has undertaken to act for or on behalf of another in particular circumstances which gives rise to a relationship of trust and confidence. In *Black's Law Dictionary* (7th Ed) 'fiduciary' is defined as 'one who owes another the duties of good faith, trust, confidence and candour'. It also defines as 'one who must exercise a high standard of care in managing another's money or property'.

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[48] For a fiduciary duty to exist, there must be a special relationship of fiduciary and principal. A civil cause of action of a breach of fiduciary duty occurs when the fiduciary fails to meet one of its obligations which would entitle the principal to compensation for his loss or to restitution for the fiduciary's unauthorised gain (*Bristol and West Building Society v Mothew; (t/a Stapley & Co)* [1996] 4 All ER 698).

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The Federal Court in *Gurbachan Singh s/o Bagawan Singh & Ors v Vellamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719 said:

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For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or to advance the interest of another. This is perhaps the most obvious of the characteristics of the fiduciary office for equity will only oblige a person to act in what he believes to be another's interest if he himself assumed a position which requires him to act for or on behalf of that other in some particular matter. Thus, the essential element is that there must be some undertaking on the part of a fiduciary to act with loyalty in the interest of the other party. A fiduciary is someone who had undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.

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[49] Thus, distilling from the above authorities, in order to determine whether one owes a fiduciary duty to a principal, the nature of the functions and duties of the alleged fiduciary must be examined. The facts of the present case are devoid of any evidence of any form of entrustment nor of any contractual/fiduciary relationship between the plaintiff and the second defendant. The plaintiff failed to prove that he had appointed the second defendant to act on his behalf in the transaction.

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[50] From the contemporaneous documentary evidence adduced, it is clear that it was the first defendant who had appointed the second defendant and that the first defendant had issued instructions to the second defendant on how the moneys he received were to be disbursed. The second defendant has shown

A that the monies that he received and disbursed out were adequately accounted for and that there is no basis for any breach of trust or misappropriation of any kind. Apart from the legal fees that are due to him from the first defendant, which should not be the concern of the plaintiff, there is no evidence that the
B moneys were not disbursed according to instructions.

[51] There is no causal link shown between the plaintiff and the second
C defendant as far as the transaction for the TOL application is concerned. The second defendant was neither a party nor privy to the negotiations, be it the loan agreement or the MOUs between the first defendant and Tuanku or the plaintiff and Tuanku.

Whether there is conspiracy to defraud

D [52] The plaintiff in his *memorandum tambahan* at p 3 of the *RRT Jld 1* states that the learned trial judge erred when he failed to conclude that there was conspiracy between the first and the second defendant when there were circumstantial evidence to support, namely:

- E (i) the two receipts issued by the first defendant to the second defendant;
(ii) the letter of indemnity;
(iii) the appointment letter of the first defendant to the second defendant;
(iv) the sample agreement between Alefra Corp Sdn Bhd and Tuanku which
F was prepared by the second defendant where the second defendant by mistake referred to the first defendant as being a director; and
(v) the second defendant when preparing the sample agreement for and on
G behalf of the first defendant should have known that there was no application for the rights to harvest.

[53] The learned trial judge had addressed fleetingly in his grounds at paras 21 and 25 of the tort of conspiracy to defraud as follows:

H 21. Defendan pertama dan SD1 di dalam keterangan mereka telah menyatakan bahawa mereka tidak langsung di maklumkan dengan keputusan DYMM Sultan Pahang menarik balik permohonan TOL. Keterangan SP3 nyata memeranjatkan mereka. Persoalannya, apakah keterangan defendan pertama dan SD 1 berkemungkinan benar atau hanya satu keterangan 'after thought' setelah *terlibat dengan konspirasi untuk menipu* seperti yang didakwa peguam pihak plaintif?

I 25. Persoalan seterusnya, apakah status perjanjian pinjaman tersebut? Pihak plaintif mendakwa ianya *satu konspirasi untuk menipu* plaintif. Peguam defendan pertama berhujah bahawa telah berlaku kekecewaan dalam perjanjian dan peruntukan s 57 Akta Kontrak 1950 terpakai. Peguam defendan kedua membangkitkan isu penggunaan sebahagian duit pinjaman untuk melobi kelulusan permohonan yang

menjadikan perjanjian pinjaman berlawanan dengan kepentingan awam dan tidak sah.

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After going through the loan agreement between the plaintiff and the first defendant, the MOUs and the TOL application, the learned trial judge concluded that parties labored under a mistake of fact, hence rendering the agreement between the plaintiff and the first defendant void under s 21 of the Contracts Act 1950 (para 26 of the grounds). The learned trial judge did not make any specific finding on the tort of conspiracy to defraud, despite stating so, in paras 21 and 25 in his grounds.

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[54] It is our observation that, firstly, the re-amended statement of claim at pp 137–145 of the *RR Jld 1A* do not contain any averment of conspiracy/conspiracy to defraud against the first and/or the second defendants. It is trite law that parties are bound by their pleadings and failure to plead will preclude the party from raising the same. Hence the plaintiff is precluded from raising this issue.

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[55] In any event, in determining the issue of conspiracy, there are two forms of the tort of conspiracy, namely, conspiracy to use unlawful means and conspiracy to injure. Conspiracy to use unlawful means is proven when two or more individuals combine to commit an unlawful act or to carry out an unlawful purpose with the intention to cause injury or damage to the plaintiff. In conspiracy to injure, lawful means are used but the plaintiff must prove that there was a predominant purpose on the part of the defendants to injure the plaintiff in carrying out their common purpose. As far as our case is concerned, it is not certain which form of conspiracy is the plaintiff advocating to, as there is no pleading as such nor particulars thereof.

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[56] The so called circumstantial evidence listed as in *memorandum tambahan* at p 3 of the *RRT Jld 1* (para 52(i)–(iii) in this judgment) could not establish any form of conspiracy to defraud against the second defendant. As far as the document at para 52(iv) in this judgment, relates to the copy of an the MOU between the first defendant and Tuanku, given to the plaintiff to be used as sample for the MOU to be signed between the plaintiff and Tuanku in the event the TOL application is successful. Nothing turns on this document. On para 52(v), plaintiff failed to call material witness to confirm the veracity of the TOL application by Tuanku and the letter to cancel the TOL application from the private secretary of Tuanku. There was no denial that the harvesting rights were legally applied for, by the first defendant and there is no evidence to suggest that the first defendant or the second defendant were aware of the cancellation of the application by the private secretary of Tuanku. Neither was there a duty imposed on the second defendant to find out about the status of the TOL application at the material time.

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A [57] Therefore there is no basis for an allegation of conspiracy to defraud the plaintiff, against the second defendant.

[58] On the issue of illegality and s 21 of the Contracts Act 1950, it is relevant as against the first defendant, hence we chose not to address them here.

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CONCLUSION

C [59] There is no evidence of any contractual relationship between the plaintiff and the second defendant. Therefore the learned trial judge did not err when he found that there was no trust created as against the second defendant. Hence there is no issue of any breach thereof. The relief sought for a declaration that the monies ie RM550,000 is held by the second defendant upon trust for the plaintiff, therefore fails.

D [60] Accordingly, we dismissed the appeal by the plaintiff against the second defendant with costs subject to allocator. The appeal against the first defendant is struck out and deposit refunded.

E *Order accordingly.*

Reported by Ashok Kumar

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